Cr. 7840/ (2) (14)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR: CHHATTISGARH

Single Bench

FIRST APPEAL NO. 121 OF 2006

FIRST APPEAL UNDER SECTION 96 OF THE CODE OF CIVIL PROCLEDURE, 1908

APPELLANTS
DEFENDANTS

1. State of Chhattisgarh through the Collector, Distt. Durg, Chhattisgarh, Distt. Office, Durg (CG)

2. Chief Medical & Health Officer, through the Chief Medical officer, Hospital Campus, Durg, Tehsil & Distt. Durg (Chhattisgarh)

3. Primary Health Centre, Gunderdehi, Distt. Durg (CG) through the Officer-in-charge, Primary Health Centre, Gunderdehi, Distt. Durg (Chhattisgarh)

P.R. No. 1931/06
Presented by Shri Sanjay Agrawal
dated 06/7/06

Versus

RESPONDENT
PLAINTIFF

Smt. Manju Bai, aged about 30 years, W/o Suresh Chandrakar, Caste - Kurmi, Occupation - Housewife, R/o Village - Kawandur, P.O. Kawandur, Tenshi - Gunderdehi, P.S. Gunderdehi, Distt. Durg (Chhattisgarh)

CLAIM IN APPEAL FOR SETTING ASIDE THE DEFREE OF COMPENATION

VALUED AT RS. 67,000/- (RUPEES

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A.F.R.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक F.A. No. 121 सन् 2006

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	11.1.2007 Mr. V.D. Vaswani, Government Advocate for the State/Appellants. Mr. R.K. Gumasta, Advocate for the Respondent. Heard. This appeal is directed against the judgment and decree dated 30.12.2005 delivered by IInd Additional District Judge, Durg, in Civil Suit No. 9B/2004, whereby a compensation of Rs. 67,000/- was awarded with interest @ 7% from the date of the judgment to the respondent/plaintiff on account of failure of sterilisation operation performed on the respondent on 28.2.1998 at Primary Health Centre, Gundardehi. I have perused the plaint. Negligence of the doctor conducting sterilisation operation is neither pleaded nor proved. In the case of State of Punjab vs. Shiv Ram and others, reported in (2005) 7 SCC 1, the Apex Court held as under:- "Merely because a woman having undergone a sterilisation operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy of unwanted child. The claim in tort in such cases can be sustained only if there was negligence on the part of the surgeon in performing the surgery and not on account of childbirth. The proof of negligence shall have to satisfy Bolam's test, (1957) 2 All ER 118, 121 D-F, set out in Jacob Mathew case, (2005) 6 SCC 1, at p. 19, para 19. Failure due	

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश – 2 –	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

to natural causes would not provide any ground for a claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. Section 3(2) read with Explanation II thereto, of the Medical Termination of Pregnancy Act, 1971 provides under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

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So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and it was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. Ordinarily a surgeon does not offer such guarantee. Where a doctor contracted to carry out a particular operation on a patient and a particular result was expected, the court would imply into the contact between the doctor and the patient a term that the operation would be carried out with reasonable care and skill, but would be slow to imply a term or unqualified collateral warranty that the expected result would actually be achieved, since it was probable that no responsible medical man would intend to give such a warranty.

The plaintiffs have not alleged that the lady surgeon who performed the sterilisation operation was not competent to perform the surgery and yet ventured into

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 3 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recoginsed by medical science. It is a pure and simple case of sterilisation operation having failed though duly performed. The trial court has proceeded to pass a decree of damages in favour of the plaintiff-respondents solely on this ground. No finding has been arrived at that will hold the operating surgeon or its employer - the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside."

From perusal of the record of Civil Suit No. 9B/2004, it is clear that the appellants/defendant had also examined Dr. C.B.Prasad, D.W.-1, who had conducted the sterilisation operation on the respondent/plaintiff. It emerges therefrom that the respondent/plaintiff was advised to maintain abstinence from her husband for a period of 3 months after the sterilization operation, since there was a possibility of failure of the sterilisation. There is nothing on record to show that when the respondent/plaintiff conceived immediately after the sterilisation operation, she went for termination of pregnancy, which was

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश – 4 –	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

permitted under law. Thus, the child born to the respondent/plaintiff would not be said to be an unwanted child.

In view of the principles enunciated by the Apex Court in State of Punjab vs. Shiv Ram and others (supra), in the absence of pleading or proof of negligence on the part of the operating surgeon, the claim in tort must fail. In this view of the matter, the impugned judgment cannot be sustained under law and is liable to be set aside.

As a result, the appeal is allowed. The impugned judgment and decree dated 30.12.2005 delivered in Civil Suit No. 9B/2004 is set aside. The suit is dismissed. There shall be no order as to costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Bablu

P.T.O.